Supreme Court, U.S.
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No. 05-_____

In The
Supreme Court of the United States

JEFFREY STERLING,

Petitioner,

v.

GEORGE TENET et al.,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals erred in affirming dismissal of a racial discrimination lawsuit filed by a CIA Operations Officer based on the state secrets privilege, prior to any discovery or consideration of non-privileged evidence, and without trying to implement any protective procedures to permit the continuation of the litigation.[1]

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[1] This question is virtually identical with respect to the legal issues surrounding the invocation of the state secrets privilege to that in *Sibel Edmonds v. Department of Justice et al.*, No. 05-____ (filed August 3, 2005), which is currently pending Certiorari consideration. For the first time in likely the history of the privilege, there are at least five state secrets cases that assert unlawful conduct by the Executive Branch that are pending at once, to include *Sterling* and *Edmonds*. Four of the cases are at the Circuit Court level or above. *See Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005)(related to the original state secrets litigation in *U.S. v. Reynolds*), *Richard Horn. v. CIA et al.* (currently sealed, but on appeal before the D.C. Cir.); *Arar v. Ashcroft*, No. 04-CV-0249-DGT (E.D.N.Y., filed Jan. 22, 2004).

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Jeffrey Sterling. The respondents are George Tenet, Director, Central Intelligence Agency (DCI Tenet); the Central Intelligence Agency (CIA); and Does #1-10.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioner states that he has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI[2]

Petitioner Jeffrey Sterling, a former Operations Officer for the CIA who alleged racial discrimination concerning his assignments and promotions, seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of his case on the basis of the state secrets privilege.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 416 F.3d 338 (4th Cir. 2005). Appendix (App.) 1a-16a. The opinion of the U.S. District Court for the Eastern District of Virginia is unreported, App. 17a-30a, as is that of the U.S. District Court for the Southern District of New York. App. 31a-42a.

JURISDICTION

The Court of Appeals entered its judgment on August 3, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291. The jurisdiction of the district court was invoked under Title Seven of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981.

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[2] This document has undergone a classification review by the CIA. Although not intended to contain any classified information, it may well be that the CIA redacts portions of this document under the guise of secrecy. Therefore, the version filed with the Court may contain redactions. If that is the case, this Court should respectfully review an unredacted version of the pages contained herein.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.* are reprinted in the Appendix. *See* App. 43a-55a.

STATEMENT OF THE CASE

A. Claims Of Racial Discrimination And Retaliation

Sterling, an African-American, was an Operations Officer for the CIA in the Near East and South Asia Division from 1993-2001. *See* Court of Appeals Joint Appendix (C.A. App.) at 88. While employed by the CIA, Sterling experienced unlawful discriminatory practices at the hands of his CIA management. *See* Redacted Complaint at ¶¶5-11 (dated August 28, 2001).

Sterling arrived in New York in January 1999. *Id.* at ¶6. CIA management placed expectations on him "far above those required of non-African-American Operations Officers." *Id.* at ¶7. He was repeatedly passed over for operational opportunities and subjected to disparate treatment as the only African-American operations officer [THREE WORDS REDACTED BY CIA]. *Id.* at ¶8. In April 2000, CIA management, motivated by a discriminatory animus, presented him with an unrealistic and unjustified Advanced Work Plan that was considerably more demanding and "harsher" than any requirements placed on non-African-Americans. *Id.* at ¶7.

Sterling also contended that he was retaliated against for utilizing the equal employment opportunity (EEO) process. *Id.* at ¶9. Specifically, Sterling claimed that although he was not scheduled to undergo updated security processing until 2001, CIA management scheduled him to undergo security processing in May 2000. *Id.* Furthermore, he claimed that security processing is an "arbitrary regime within the CIA

that is utilized more for its nature as a tool for intimidation than any substantive security implications." *Id.*

Sterling claimed management vandalized his personal property. *Id.* The discrimination Sterling suffered was part of a pattern and practice racial discrimination he suffered at the CIA. Finally, he was denied work opportunities and routinely passed over for assignments by CIA management because of his size, the color of his skin and his ability to speak a language (taught to Sterling by the CIA) that was not typical for African-Americans. *Id.*

B. Proceedings Before Two District Courts

i. U.S. District Court for the Southern District of New York

The initial case was filed *pro se* on August 28, 2001.[3] Before filing an Answer, on April 18, 2002, the CIA filed a Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue. The basis for dismissal was the formal assertion by DCI Tenet of the state secrets privilege. The parties thereafter briefed the issue, and the District Court issued its decision on January 23, 2003, wherein it found the invocation of the state secrets privilege to have been "inappropriate". *See* C.A. App. at 16 (*Sterling v. Tenet et al.*, No. 01 Civ. 8073, slip op. at 8 (S.D.N.Y Jan. 23,

[3] The CIA considers portions of the *pro se* Complaint to be classified, an allegation that Sterling disputes, and the document was placed under seal four months after it was filed. A redacted version of the Complaint was publicly filed in January 2002, and it is that document that will be cited to in this brief.

2003)(SDNY Decision)); App at 31a-42.[4] However, the Court nevertheless transferred the case to the United States District Court for the Eastern District of Virginia.

ii. U.S. District Court for the Eastern District of Virginia

Notwithstanding initial warnings by the Court against asserting the state secrets privilege, the CIA did so on August 18, 2003. Despite the CIA's refusal to permit Sterling's local counsel to substantively participate in the litigation, and the seizure of important EEO cases files from counsel through threats of the loss of security clearance or criminal prosecution, C.A. App. at 95, the matter was briefed and oral arguments occurred on December 5, 2003. The District Court dismissed the case in its entirety on March 3, 2004. *See* C.A. App. at 70-87 (*Sterling v. Tenet et al.*, Civil Action No. 03-CV-329, slip op. (E.D.V.A. Mar 3, 2004)(EDVA Decision)); App. 17a-30a.

C. Proceedings Before The Fourth Circuit Court Of Appeals

Following the dismissal of Sterling's case, a timely appeal was filed. Oral arguments were heard on May 26, 2005. On August 3, 2005, a panel of the Fourth Circuit Court of Appeals unanimously upheld the District Court's dismissal based on the state secrets privilege. *See* App. at 1a-16a.

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[4] This decision was sent to the parties' counsel but issued under seal. The CIA claims it contains classified information, which Sterling disputes. Counsel was not permitted to retain any copies and has had to work from memory with respect to its contents. The CIA filed a redacted version of the decision on September 2, 2003. There is no evidence the Fourth Circuit ever reviewed the unredacted version.

REASONS FOR GRANTING THE PETITION

The Court should grant review to resolve existing conflicts and provide more explicit guidance to the lower courts about the proper scope and application of the state secrets privilege, and to prevent further misuse of the privilege to dismiss lawsuits at the pleading stage. The Court has not directly substantively addressed the state secrets privilege since it created it more than 50 years ago. Since that time the privilege has been slowly and methodically expanded by the Executive Branch amidst known reluctance of lower courts to challenge or even review the invocation. What was once essentially, in practical application, a shield privilege possessed by the Executive Branch to prevent disclosure of certain discovery, has mutated into a sword for the purposes of squelching legitimate allegations of Government wrongdoing and misconduct.

Last Term, in *Tenet v. Doe*, the Court considered the *Totten* doctrine, which permits outright dismissal at the pleading stage of cases involving secret espionage contracts. Although it contrasted *Totten* with the state secrets privilege, there was no occasion to clarify the proper scope and use of the state secrets privilege. This case, among several, presents that occasion. Despite possessing the experience and capacity of instituting available protective measures to address possibly classified information, lower court's continue to claim, contradictorily, accommodations are not possible notwithstanding numerous examples in the past decades, and especially post-9/11, to adjudicate national security cases both civilly and criminally. There is no fundamental difference between civil or criminal cases that affect a lower court's capability to adopt alternative protective measures short of outright dismissal of a case. Dismissal of Sterling's straightforward racial discrimination case at the pleading stage illustrates the unnecessary infliction of harm that result from the current application of the state secrets privilege.

I. THE COURT SHOULD GRANT REVIEW TO EXAMINE AND CLARIFY THE APPROPRIATE SCOPE AND APPLICATION OF THE STATE SECRETS PRIVILEGE.

A. Lower Courts Have Interpreted and Expanded the Privilege in a Conflicting Manner Beyond the Scope Originally Set by this Court

In recent decades the lower courts have created conflicts involving the state secrets privilege particularly as the privilege has been increasingly utilized and expanded. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 86, 101-02, 107 (Spring 2005). This Court, of course, created the state secrets privilege more than fifty years ago in *United States v. Reynolds*, 345 U.S. 1 (1953) and it has not directly considered its application since then. At that time there were but a handful of lower courts that had considered a variation of the privilege. *Id.* at 7 n.11. Although this Court admonished that the privilege is "not to be lightly invoked," *Id.*, 345 U.S. at 7, that admonition has fallen by the wayside. Although between *Reynolds* and 1976, there were only four cases in which the government invoked the privilege, from 1977 to 2001, the number of *reported* cases concerning the privilege rose to fifty-one. Weaver & Pallitto at 101. And in the first term of the present Administration, the privilege has been invoked in at least seven cases. *Id.* at 109, n.88.

Perhaps most importantly, the privilege has significantly mutated from when first invoked in *Reynolds*. Originally it predominately existed in cases where the U.S. government intervened as a third-party to prevent disclosure of information sought through discovery. Since the mid-to-late 1980s, the privilege is now commonly invoked against federal employees in order to defeat allegations of Executive Branch wrongdoing.

In *Reynolds*, family members of civilians who died in the crash of a military plane sued a non-governmental party for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. 345 U.S. at 3-4. Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the Court required "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8. The *Reynolds* Court cautioned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Although the Court upheld the claim of privilege over the accident report, it did not dismiss the suit. Following remand and further discovery the case settled.[5]

Courts have generally interpreted *Reynolds* as creating "a common law evidentiary rule that allows the government to

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[5] Newly disclosed facts about the *Reynolds* litigation further compel the need for the Court to now review the state secrets privilege. The accident report at issue in *Reynolds* was declassified, and found not to contain any details about secret military equipment. *See Herring v. United States*, 2004 LEXIS 18545 at *26 (E.D. Pa. Sept. 10, 2004)(noting that the accident report "does not...refer to any newly developed electronic devices or secret electronic equipment"); *aff'd*, 424 F.3d 384 (3rd Cir. 2005). Thus, the true motivation for the government's original invocation of the privilege is at least suspect, and demonstrates the importance for the courts to seriously examine the invocation. *See also The Secret of the B-29*, L.A. TIMES, Apr. 18, 2004, at A1 (reporting on the recently unclassified accident report and the *Reynolds* litigation).

withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991), *citing In re U.S.*, 872 F.2d 472, 474 (D.C.Cir.), *cert. denied*, 110 S. Ct. 398 (1989). This Court never articulated or suggested it should or could be used to justify dismissal of an entire case at the pleading stage. And for good reason.

"Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff [his] day in court, however, is indeed draconian. '[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked.'" *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985). "Without judicial control over the assertion of the privilege, the danger exists that the state secrets privilege will be asserted more frequently and sweepingly than necessary leaving individual litigants without recourse." *NSN International Industry v. E.I. DuPont De Nemours*, 140 F.R.D. 275, 278 (S.D.N.Y. 1991), *citing Ellsberg*, 709 F.2d 51, 57 (D.C. Cir. 1983). Unfortunately, in the last two decades this drastic remedy has been increasingly successfully invoked. Weaver & Pallitto at 101, 109, n.88.

Last term in *Tenet v. Doe*, 125 S. Ct. 1230 (2005), the Court re-examined *Totten v. United States*, 92 U.S. 105 (1875), which established the *Totten* doctrine and bars judicial review in cases "where success depends upon the existence of [a] secret espionage relationship with the government." This Court stated that *Totten* is a "unique and categorical bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet*, 125 S. Ct. at 1235 n.4. The *Totten* doctrine thus requires a case to "be dismissed on the pleadings without ever reaching the question of evidence." *Id.* at 1237.

In affirming the dismissal of Sterling's case the Fourth Circuit interpreted this Court's ruling in *Tenet* as

unanimously reaffirming "the vitality of the privilege." *Sterling v. Tenet et. al.*, 416 F.3d 338, 341 (4th Cir. 2005). The "vitality" of the privilege, however, was neither at stake nor the issue. In fact, this Court made it clear that a distinction existed. *Tenet*, 125 S. Ct. at 1237. Though the Court clarified and upheld the *Totten* rule in *Tenet*, it did not clarify the proper scope and use of the evidentiary state secrets privilege.

This observation would also seemingly apply to the notion of "graymail", which has apparently now been relied upon for the first time as justification to affirm dismissal of a state secrets case. "Graymail" is a practice where 'individual lawsuits [are] brought to induce the CIA [or another government agency] to settle a case) or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations.'" *Sterling*, 416 F.3d at 344, *quoting Tenet*, 125 S. Ct. at 1238. The Fourth Circuit utilized this Court's rationale in addressing a *Totten* situation to expand the state secrets privilege to encompass broader circumstances.

> The state secrets privilege provides a necessary safeguard against litigants presenting the government with a Hobson's choice between settling for inflated sums or jeopardizing national security. Were judges to fail to take care to avoid unnecessary risks of disclosure when the privilege is invoked, the incentives for graymail would correspondingly increase.

Id. Yet the *Totten* doctrine's categorical bar that led to discussion of "graymail" is quite different, as this Court recognized, than the state secrets privilege. Indeed, this Court emphasized the "obvious difference" between a contract action initiated by an unacknowledged covert spy, and a discrimination action such as in *Webster v. Doe*, 486 U.S. 592 (1988), that was brought by an "acknowledged (though

covert)" employee of the CIA. *Tenet*, 125 S. Ct. at 1237. "*Totten's* core concern [is] implicated" only in the first instance because the very nature of the relationship must remain covert. *Id.* In contrast, employment cases like *Webster* and *Sterling* are noted to be "regularly entertain[ed]" by the courts. *Id.* This is so because various steps can be implemented to protect specific information.[6]

The Court should accept review of the present case (and in light of the other state secrets cases that are either pending Certiorari consideration or before the Circuit Courts) to examine the application of the privilege by the lower courts in the half-century since this Court created the privilege. In particular, it is of paramount importance that this Court articulate the extent to which lower courts are to ever take into account alternative arrangements to protect the allegedly classified information before dismissing a case outright, especially when the plaintiff and counsel possess the requisite security clearances.

B. Lower Courts Conflict on Degree of Probing

The lower courts have issued different rationales and decisions regarding the depth to which the appropriateness of the government's invocation of privilege can be probed. On the one hand, "[o]nce the privilege has been formally claimed, the court must balance the 'executive's expertise in assessing privilege on the grounds of military or diplomatic security' against the mandate that a court 'not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.'" *In re U.S.*, 872 F.2d at 475-476. "To some degree at least, the validity of the government's assertion

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[6] The notion of "graymail" is further belied by the fact that EEOC proceedings involving CIA employees are regularly litigated and actually permit significant utilization of classified information, including access by cleared counsel.

must be judicially assessed." *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 822 (D.C. Cir. 1984).

On the other hand the Fourth Circuit made clear in this case that "when a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not – indeed, should not – probe further." *Sterling*, 416 F.3d at 345. The manner by which "substantial and real" are to be determined, as well as where the proper line is drawn with respect to probing are completely unknown. Thus, the Fourth Circuit's rationale appears in direct conflict with this Court's opinion that "[t]he greater the necessity for the allegedly privileged information in preserving the case, the more a 'court *should probe* in satisfying itself that the occasion for invoking the privilege is appropriate.'" *Reynolds*, 345 U.S. at 11.

Although "utmost deference" is to be accorded to the executive's expertise, *see United States v. Nixon*, 418 U.S. 683, 710 (1974), the government must show, and the court must *separately confirm*, that "the information poses a reasonable danger to secrets of state." *Halkin v. Helms*, 690 F.2d 977, 990 (D.C.Cir. 1982).

Of course, the degree of deference to be extended to the Executive Branch on matters of national security was the subject of discourse and debate by this Court in *Hamdi et al. v. Rumsfeld et al.*, 124 S. Ct. 2633 (2004). At a difficult time in our Nation's history this Court was "called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an 'enemy combatant' and to address the process that is constitutionally owed to one who seeks to challenge his classification as such." *Id.* at 2635. The Fourth Circuit had held that the detention was legally authorized and that no further opportunity was available to challenge the status label assigned by the Executive Branch. *Id.* It had also found that the district court's actions had failed to extend the

appropriate deference. *Id.* at 2636, *citing Hamdi et al. v. Rumsfeld et al.*, 296 F.3d 278, 279 (4th Cir. 2002). Finally, it also believed that separation of powers principles prohibited a federal court from "delv[ing] further into Hamdi's status and capture." *Hamdi*, 124 S.Ct. at 2638, *quoting Hamdi et al. v. Rumsfeld et al.*, 316 F.3d 450, 473 (4th Cir. 2003).

Although state secrets cases do not involve criminal law, the discussion of deference and principles of separation of powers is not only analogous but also compelling. The concerns are identical. The directions from this Court were clear.

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to actual prosecution of war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Hamdi, 124 S.Ct. at 2649-50. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. *Id.* at 2650.

In Sterling's case, the lower courts declined to engage in any sort of probing. The District Court noted that it is not "an intelligence agency" and observed that:

> it is not the place of the Court to oversee the classification of documents and information, to examine or question the rationale of why officials classified this information at the level it is, or to redetermine whether information is truly "Secret" or "Top Secret." The only time in which a court should

> deny the privilege is if, after an examination of the agency head's declaration of his reasoning behind asserting the privilege, it is transparently obvious that the agency is engaging in an abuse of the privilege.

Id.[7]

The District Court's creation, seemingly adopted by the Fourth Circuit, of a new standard for state secrets cases of "obvious transparency" further conflicts with this Court's precedent. The District Court did exactly what *Reynolds* prohibits and "abdicated to the caprice of executive officers." 345 U.S. at 9-10. "While judges should acknowledge, their limitation in areas where they lack expertise, the difficult task in assessing a claim of 'state secrets' privilege calls for a particularly judicial expertise balancing the government's need for secrecy against the rights of individuals." *Halkin v. Helms*, 598 F.2d 1, 15 (D.C. Cir. 1978). This Court has made it clear:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

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[7] The District Court's conflict with *Reynolds* was echoed during oral arguments. *See* C.A. App. at 47. The Court also stated: "I have -- and I' m not hesitant to express some sense that the Court really does not have a way to do anything more than to look at the declaration and make a judgment whether it qualifies under the state secrets privilege. I don't think I need to reach the other issues involved about the substance of Mr. Sterling complaint." *Id.* at 68.

United States v. United States District Court (Keith), 407 U.S. 297, 320 (1972).

The role Congress has assigned the courts in assessing claims of "national security" under the Freedom of Information Act gives further support to the need for this Court to clarify the extent to which a lower court should probe the invocation of the state secrets privilege. In amending the Freedom of Information Act (FOIA) in 1974, Congress explicitly rejected both this Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973)(limiting the court's role in assessing security classifications under FOIA) and President Ford's argument in opposition to the amendments ("the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise."). Message from President Gerald R. Ford Vetoing H.R.12471, H.Doc.No.93-383, 93d Cong., 2d Sess. (1974).

The 1974 Amendments explicitly empowered courts to make *de novo* classification determinations. *Halkin*, 598 F.2d at 16 (citations omitted). Interestingly, though FOIA, as a disclosure statute, grants federal courts the utmost authority to explicitly reject the Executive Branch's classification decisions, the Fourth Circuit relied upon FOIA to justify the CIA's power to withhold information and dismiss litigation under the state secrets privilege. *Sterling*, 416 F.3d at 346.

Moreover, in adjudicating FOIA Exemption 1 national security disputes, lower courts often, though it is not absolutely required, review the highly classified documents in question *in camera*. The Fourth Circuit below seized upon this Court's 1953 language that "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 344, *quoting Reynolds*, 345 U.S. at 10. But the capability and experiences of 1953 courts are nowhere like that of courts today.

C. Lower Courts Conflict Regarding Utilization Of Alternative Remedies

Additionally, the case law reveals quite clearly that the lower courts have no uniform practice of considering alternatives before dismissing a suit on the basis of the state secrets privilege. Several courts have dismissed cases on the basis of the privilege without even considering alternatives. *See e.g., Sterling*, 416 F.3d at 348; *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980)(*en banc*); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004).

Other courts have refused to dismiss cases on the basis of the privilege where certain mechanisms to protect sensitive information would enable the case to proceed. *See e.g., Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958)(refusing dismissal as case could be tried *in camera*); *In re United States*, 872 F.2d at 478 (discussing bench trials, protective orders, seals and other mechanisms that may be employed to protect sensitive information); *see also Fitzgerald*, 776 F.2d at 1244 ("Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted.").

This conflict has widened to such an extent that it now applies within Circuits rather than simply between them. *Compare Fitzgerald*, 776 F.2d at 1244 (courts should use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form.") *with Sterling*, 416 F.3d at 348 (refusing to devise procedures for "[a]t best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.").

Still other courts have allowed non-privileged discovery after invocation of the privilege, with dismissal only if the

privileged evidence is necessary for plaintiff to prove a *prima facie* case or for defendant to assert a valid defense. *See e.g., McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003)(dismissing suit only after discovery and determination that claims could not be proved through non-privileged evidence); *Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1987)(refusing dismissal based on state secrets privilege because plaintiff could produce non-privileged evidence); *Ellsberg*, 709 F.2d at 64 n.55 (reversing dismissal of constitutional tort action where district court "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."). *See also Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968)(upholding claim of privilege in a defamation suit, but remanding for further discovery of non-privileged evidence); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001)(upholding privilege claim but remanding for further discovery of non-privileged evidence); *Molerio*, 749 F.2d at 822 (halting discovery but terminating employment lawsuit only after evaluating plaintiffs' non-privileged evidence).

Some courts have dismissed suits without examining the allegedly privileged evidence *in camera*. *See Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995)(examining only government declarations); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998)(same). Other courts have found such review a prerequisite before contemplating dismissal. *See Ellsberg*, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate, but obligatory"); *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980)(stating that "a party's showing of need often compels the ... court to conduct an *in camera* review of the documents allegedly covered by the privilege in order to determine whether the records are properly classified 'secret' by the government").

Some courts have even permitted plaintiffs an opportunity to obtain discovery in order to pursue non-privileged material. *See e.g., In re United States*, 872 F.2d at 478-79 (rejecting categorical invocation of privilege); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001)(upholding privilege but rejecting premature dismissal and remanding for further discovery); *Monarch Assurance*, 244 F.3d at 1364 (reversing premature dismissal on basis of privilege to enable further discovery of non-privileged evidence); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978)(rejecting pre-discovery motion as premature). *See also Molerio*, 749 F.2d at 822-26 (affirming dismissal after FBI answered complaint and complied with discovery); *Halkin*, 690 F.2d at 984, 1009 (affirming dismissal after parties had fought "the bulk of their dispute on the battlefield of discovery"); *Halkin*, 598 F.2d at 5 (affirming partial dismissal and reversing decision rejecting privilege that was certified as interlocutory appeal).

i. Courts are Capable of Handling Cases that Potentially Involve Classified Information and Ensuring Such Information is Adequately Protected from Unauthorized or Inadvertent Disclosure

It should be the duty and obligation of every lower court to make every conceivable attempt to fashion procedures that allow cases to continue before dismissal under the state secrets privilege. There is no legal or factual distinction with respect to how courts and litigants can adequately protect alleged classified information in civil or criminal proceedings. Concerns regarding the unauthorized or inadvertent release of classified information are identical.

There is no question that lower courts have the authority to "fashion appropriate procedures to protect against disclosure." *Fitzgerald*, 776 F.2d at 1243. *See generally* Comment, *Keeping Secrets from the Jury: New Options for*

Safeguarding State Secrets, 47 Fordham L.Rev. 94, 109-113 (1978)(discussing options short of dismissal for the protection of state secrets); J. Zagel, *The State Secrets Privilege*, 50 Minn. L.Rev. 875, 885-88 (1966)(discussing procedures to protect secrets yet allow cases to go forward); *Cf.* Classified Information Procedures Act, 18 U.S.C. App. (1980)(procedures for use of classified information in criminal trials). "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted." *Fitzgerald*, 776 F.2 at 1244.

It is no longer the case that courts are incapable of handling information, whether privileged or classified, without taking adequate protections and safeguarding the information. In recent years the unfortunate rise in actual and attempted terrorist activities, as well as espionage, against our country have led to a large number of prosecutions where classified information was involved. Indeed, the U.S. District Court for the Eastern District of Virginia, where Sterling's case would proceed, has become one of the most knowledgeable and experienced courts in the country with respect to utilizing and protecting classified information. That knowledge and experience must and should be taken into account.

Nevertheless, notwithstanding their expertise in protective measures, the District Court and Circuit Court's examination of Sterling's case amply demonstrated the unfounded expansion that the lower courts have applied to *Reynolds*. For example, both Courts abdicated responsibility by unhesitatingly accepting the CIA's characterization of how Sterling's case would proceed without considering alternatives, and refused to even consider that certain information was not, in fact, classified. The District Court noted that:

> Virtually all of Plaintiff's duties as an Operations Officer are classified. The location of Plaintiff's

> workplace is classified. All of Plaintiff's supervisors and most of his co-workers names are classified (hence Defendants John Does #1-10). The basic duties that a Court would ask a jury to perform as fact finder, such as to examine what Plaintiff's duties were, and to compare these duties to similarly situated Operations Officers, are impossible to achieve because all of this information is classified.

App. 23a. The Fourth Circuit similarly adopted these findings. For example, it noted that "[m]any of the witnesses would necessarily be covert CIA operatives. Forcing such individuals to participate in a judicial proceeding – or even to give a deposition – risks their cover." *Sterling*, 416 F.3d at 347.[8] Yet the CIA itself justified its motion to transfer the case from New York to Virginia by arguing that its employees' "presence in the Eastern District of Virginia would not be suspect because of the presence of CIA

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[8] The lower court's handling of *Sterling* further conflicts with other Circuits. There is a lack of any clear indication in light of *Webster* and, for example, the D.C. Circuit's decision in *Ellsberg*, as to the context regarding when the courts are to consider the application of the state secrets privilege. In *Sterling* the lower courts each time reviewed the CIA's information as if it were current. Yet, the D.C. Circuit has applied a standard that when "evaluating the propriety of the court's decision upholding the government's claim, the relevant 'circumstances' are those extant when the court rendered its decision, not when either the wiretaps took place or the privilege was first asserted. The passage of time has a profound effect upon such matters, and that which is of utmost sensitivity one day may fade into nothing more than interesting history within weeks or months." *Ellsberg*, 709 F.2d at 61 (internal citations omitted).

headquarters there." App. 40a.[9] The unclassified Final Agency Decision dated May 24, 2001, the substance of which served as the basis for the underlying litigation, and the EEO Report of Investigation and its exhibits, reveal how simple it is to protect the identities of CIA officials and operational activities yet still permit public discussion and litigation of the relevant issues. *See* C.A. App. at 143-202. This is exactly what this Court addressed in *Webster*.

In fact, the last time this Court directly addressed, outside of a *Totten* situation, the CIA's concerns that civil litigation may reveal classified information was nearly 20 years ago in *Webster*. Although *Webster* did not involve the state secrets privilege, that fact is irrelevant. It similarly involved discrimination claims raised by a covert CIA employee, and examined the CIA's ability to shield its information through

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[9] These observations are simply untrue or exaggerated. Sterling's duties as an Operations Officer could easily be discussed in an unclassified manner. *See* C.A. App. at 96-101. His workplace location is not classified. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue (dated May 31, 2002) and accompanying exhibits; C.A. App. at 16. In any event, the specific location is irrelevant. In CIA cases, it is routine to simply refer to a work location as either Domestic Location "A" or Overseas Location "B". The parties know the location, as would the court. The same applies to names of CIA officials, who can be identified by initials or pseudonyms. Moreover, depositions could be taken at CIA headquarters or some other government office before a cleared court reporter. Copies of transcripts and other discovery responses that may contain classified information would be maintained by the involved agency, but would be available to a district court for examination at the appropriate time.

available privileges. The Court considered whether a federal court can adjudicate a claim against the CIA in light of the fact the CIA and its missions are enveloped nearly completely in secrecy, and it rejected outright the CIA's attempt to shield itself from the civil litigation process when it ruled:

> the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof that would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.

486 U.S. at 604.

Additionally, when a plaintiff and counsel, as in the instant matter, have knowledge of the "classified" facts, lower courts should take the opportunity to hear *in camera* evidence to further assist it in deciding whether the invocation of the state secrets privilege is appropriate. *See McDonnell Douglas Corp. v. United States*, 27 Fed.Cl. 270 (Fed. Cl. 1996)(suggesting that where both parties have access to state secrets, the case can go forward and avoid automatic dismissal). Indeed, Sterling suggested to the district court that he submit interrogatories, document production requests and deposition notices, along with a description of what information would be expected, to enable the district court to truly assess the applicability of the privilege. C.A. App. at 61. There was no attempt on Sterling's part to embark upon a "groundless fishing expedition", the concern of which has been echoed by this Court and seized upon by the Fourth Circuit in affirming dismissal. *Sterling*, 416 F.3d at 344.

Indeed, district courts, in resolving challenges pertaining to the Guantanamo Bay detentions in the aftermath of this Court's opinion in *Hamdi*, have already implemented similar

if not identical safeguard protections that would function just as well in numerous state secrets cases. These have included, but are not limited to, requiring counsel to obtain security clearances, appropriate training with respect to handling of classified information, submission of documents before filing for classification review, use of approved secure areas and storage of information, and the recognition of the existence of statutory and judicial sanctions that exist to minimize the possibility of disclosure. *See e.g.*, *Odah et al. v. United States of America*, 346 F.Supp.2d 1, 14 (D.D.C. 2004); *In re Guantanamo Detainee Cases*, 344 F.Supp.2d 174, 178 (D.D.C. 2004).

This Court should accept review of Sterling's case in order to resolve the conflicts that exist and restore the application of the state secrets privilege to the limited nature it was intended when it was created in 1953.

II. STERLING'S TITLE VII CLAIMS COULD HAVE BEEN LITIGATED WITHOUT JEOPARDIZING NATIONAL SECURITY

Title VII was enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

The district court noted that in a "routine Title VII case ... Plaintiff Sterling could probably prove a prima facia case for race discrimination. However, the fact of the matter is that the DCI has stated that all of the information which Plaintiff needs to prove his prima facia case of race discrimination is classified at either Secret or Top Secret." C.A. App. at 79-80.

No defendant, even if the CIA, should be accorded the authority to choose the evidence upon which a plaintiff would possibly rely. Although the CIA is certainly entitled to

object on grounds of privilege to a specific piece of evidence, that is an evidentiary matter for a court to rule upon.

The unavailability of the evidence is a neutral consideration, and whenever it falls upon a party that party must accept the unhappy consequences. If the assertion of the privilege leaves plaintiff without sufficient evidence to satisfy a burden of persuasion, plaintiff will lose. If plaintiff's case might be established without the privileged information, dismissal is not appropriate. *Farnsworth Cannon*, 635 F.2d at 271-272 (citations and footnote omitted). Although upon rehearing en banc the full court in *Farnsworth* ultimately upheld the government's invocation of privilege to dismiss the action, that decision in large part relied on the fact that plaintiff's counsel would not recognize the information perceived by the government to be classified. *Id.* at 281. That is not the case for Sterling or his counsel. Moreover, the *Farnsworth* court noted that "[i]t is evident that any attempt on the part of the plaintiff to establish a prima facia case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of the its state secrets precludes any further attempt to pursue this litigation." *Id.* Thus the plaintiff in *Farnsworth* could not demonstrate with the non-privileged evidence available to it their prima facia case. Yet, here, as detailed below, Sterling can do so.

However, the lower courts held that Sterling's case must be dismissed in its entirety because state secrets were critical to the resolution of core factual questions in the case, and Sterling's ability to prove his case necessarily depends on or threatens the disclosure of privileged information. *Sterling*, 416 F.3d at 345-348. The District Court went so far as noting that "[a]lthough plaintiff argues that the redacted administrative EEO record contains sufficient unclassified direct and indirect evidence of discrimination for him to make his prima facia case, it is not for the Court, in this case, to second guess the judgment of the DCA in asserting the

state secrets privilege. The potential for inadvertent exposure of classified information, even relying upon the EEO file, is simply too great." C.A. App. at 82. The Fourth Circuit agreed. *Sterling*, 416 F.3d at 346-348.

The Circuit concluded that there is "no way for Sterling to prove employment discrimination without exposing some classified details of the covert employment that gives context to his claim." *Id.* at 346. This determination conflicts not only with other Circuits granting plaintiffs the opportunity to utilize what non-privileged evidence exists, *see infra*, but also specifically to the substantive information in this case.

In a disparate treatment case under Title VII, a plaintiff can prove unlawful discrimination through either direct evidence of racial animus, or indirect, circumstantial evidence. In the latter case a plaintiff must use the "prima facie" model developed in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 793 (1973), and updated in cases such as *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The easiest and most obvious method of proof involves direct evidence of racial animus. *Rizzo v. Means Services, Inc.*, 632 F. Supp. 1115 (N.D. Ill. 1986). If there is direct evidence of unlawful discriminatory animus that motivates an employment decision, then that is sufficient evidence of intent to support a claim of unlawful discrimination. *Spagnuolo v. Whirlpool Corporation*, 641 F.2d 1109 (4th Cir. 1981). Thus, where there is direct evidence of discrimination, the *McDonnell-Douglas* analysis need not even apply. *See e.g., Spagnuolo*, 641 F.2d at 1113; s*ee also Lovelace v. Sherwin Williams Company*, 681 F.2d 230, 242 (4th Cir. 1982)(direct evidence of discriminatory intent obviates need for *McDonnell-Douglas* analysis).

Sterling alleged the existence of direct evidence of discriminatory intent; namely that a supervisor told him that he could not receive certain positions because he was black.

See Redacted Complaint at ¶10. That Sterling was told he was "too black" cannot in any sense of the imagination justifiably threaten national security. Sterling claimed, in part, that his Advanced Work Plan (AWP) was different than those received by similarly situated non-African America officers. *See* C.A. App. at 143-188. Since Sterling was the only African-American officer at his post, and claims that his AWP was different than all other officers, he can use any other generic officer at the post as a comparator. *See id.* at 189-202.

The CIA claimed that Sterling would have to present evidence about the requirements of his position as a covert operations officer, establish that he met those requirements, and compare his performance and experiences with the performance and experiences of covert operations officers outside of his protected class. The Fourth Circuit accepted this argument. *Sterling*, 416 F.3d at 346-348. Yet experienced former CIA officials, both of whom are attorneys and participated in their own discrimination lawsuits against the CIA, noted that courts can and have easily handled similar issues without crossing over the threshold into classified information. *See* C.A. App. at 96-101. In fact, a class action lawsuit pursued by female employees at the CIA involved similar claims and was permitted to proceed. *Id.*

Even without direct evidence, a plaintiff is entitled to show discrimination "through the cumulative effect of indirect evidence having sufficient probative force independent of the presumption's meager predicates to warrant submission...." *Lovelace*, 681 F.2d. at 240. The EEO materials in this case demonstrated that substantial indirect evidence existed to meet this criteria. *See* C.A. App. at 143-188.

Sterling demonstrated that he could make a showing of a prima facie case as set forth by *McDonnell-Douglas* and *Sanderson Plumbing*. The law recognizes that because most

employers will not advertise their unlawful discrimination, *McDonnell-Douglas* established a three-part procedure for circumstantial evidence to show unlawful discrimination. *See also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). However, this procedure was never intended to be "rigid, mechanized or ritualistic." *Id.* Under this familiar analysis, Sterling initially would have to show that he is a member of a protected class and was differently treated from similarly situated white employees. *EEOC v. Metal Service Company*, 892 F.2d 341 (3d Cir. 1990). Once Sterling makes out a prima facie case, the burden shifts to the CIA to raise a legitimate, non-discriminatory reason for the disparate treatment.

At least two witnesses interviewed during the EEO process, notably Affiants E-8 and E-9, were white officers who were similarly situated but differently treated from that of Sterling. Affiant E-8's statement strongly supported Sterling's allegations even in its unclassified form.[10] This twice-redacted affidavit retains substantial evidence of a prima facie case under the strict *McDonnell-Douglas* standard and also contains evidence of pretext.

Affiant E-8, who is a white male officer, admitted that when he and Sterling compared AWP's, Sterling's AWP "required approximately twice as much in approximately half the time." This witness added that Sterling's AWP was "strikingly different" from his and that he could not provide an "alternative explanation" other than discrimination. *Id.* Additionally, this witness confirmed on the record - the identity of the supervisor is redacted - that the CIA "did not take an interest in Complainant and did not make an effort to see that he had a successful tour." Finally, Affiant E-8

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[10] There is no evidence that the lower courts conducted an *in camera* review of the unredacted version of the EEO file to judge some of the evidence for itself, particularly to determine the propriety of the classification.

recalled that another officer told him that "they - meaning management - and specifically [redacted name] were on (Complainant) from day one." C.A. App. at 189-202.[11]

Once a legitimate, non-discriminatory reason is proffered, Sterling would be required to set forth evidence to show that the proffered reason was pretextual. *Reeves*, 530 U.S. 133. That Affiant E-8 admits that the office "wished to present goals which would be difficult if not impossible" for Sterling to meet confirms that any non-discriminatory rationale for such an AWP was likely false. Showing that the CIA's purported non-discriminatory explanation is false is evidence of pretext sufficient to show a case of unlawful discrimination. *Id.* at 144. Affiant E-8 concludes that although he cannot prove that Sterling was discriminated against, he admits Sterling was treated "badly" and that he "cannot rule out" racial discrimination, particularly because

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[11] Nor does the evidence stop there. Affiant E-8 reiterates that Sterling's AWP was "harsher than mine" and that apparently the office "wished to present goals which would be difficult if not impossible to meet" by Sterling. In fact, Affiant E-8 details many areas where Sterling was treated differently than himself and other similarly situated employees. He believed that Sterling's cover was "undesirable cover" and that Sterling was apparently "the only one" in this category. He relates that Sterling had been passed over for a position that was unfilled and then readvertised, and that management delayed issuing Sterling's personnel evaluation (PAR). This is important given that Affiant E-8 testified that "I know of no other c/o who did not receive a PAR on time." Thus, clear unclassified evidence exists to demonstrate that Sterling's treatment was worse than and different from other similarly situated white officers. It is beyond doubt that the aspects of Sterling's "cover status" could be discussed in an unclassified environment, or simply redacted to be presented as the unclassified Affiant 8's testimony demonstrates.

he "did see actions which raised legitimate questions...about a possible discriminatory [] view of [Plaintiff.]"

Affiant E-9 also confirmed that Sterling was "given unrealistic requirements... and then denied the tools and resources necessary to complete the task assigned." *Id.* at 203-214. Once he could not meet impossible requirements, Sterling was labeled a "troublemaker and non-performing case officer." Affiant E-9's redacted response reveals examples of Sterling being subject to unlawful discrimination. It confirms that Sterling was the "only African-American operations officer" and that "management appeared to go out of its way to make his life very difficult." The statements of Affiant E-9 are especially extraordinary given that he expresses grave concerns that one supervisory individual involved deals "extremely harshly" and "extra-administratively" with those individuals whom he believes are a threat to his career."

Though Affiant E-10 was apparently not close to Sterling, and answered a truncated set of questions relating to potential retaliation only, he felt the need to add that "Plaintiff may have been discriminated on his FRQ request for an opening...which he had submitted the previous year." *Id.* at 215-220.

Affiant E-11 noted that management wrote negative comments into Sterling's FRQ, and did not tell him about it, which was different than the way other persons were treated. Even this admission is revealing, since Affiant E-11 expresses concerns that any officer who speaks his mind or disagrees with management "is given less to do or moved. Others chose to resign..."

These examples confirm that there was substantial information in the declassified files that could prove unlawful discrimination, and that there was ample room to explore these issues further through discovery, which would be

controlled by the lower courts as this Court envisioned in *Webster*.

CONCLUSION

For the reasons stated above, petitioner urges this Court to grant review in this case.

Respectfully submitted,

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November 2, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1495

JEFFREY ALEXANDER STERLING,
Plaintiff-Appellant

v.

GEORGE TENET, ET AL.,
Defendant-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia
(No. 03-329)

[Argued: May 26, 2005
Judgment filed August 3, 2005]

Before: WILKINS, Chief Judge, and WILKINSON and GREGORY, Circuit Judges. Judge Wilkinson wrote the opinion, in which Chief Judge Wilkins and Judge Gregory joined.

In this case we consider the applicability of the "state secrets doctrine" to a Title VII racial discrimination claim brought against the Director of Central Intelligence and ten unnamed CIA employees by a CIA covert agent. That doctrine embodies an evidentiary "privilege which protects military and state secrets" from disclosure in judicial

proceedings. *United States v. Reynolds, 345 U.S. 1, 7, 97 L. Ed. 727, 73 S. Ct. 528 (1953).* The Supreme Court has recently and unanimously reaffirmed the vitality of the privilege. *See Tenet v. Doe, 161 L. Ed. 2d 82, 125 S. Ct. 1230, 1236-37 (2005).* The district court properly concluded that this case would require disclosure of highly classified information concerning the identity, location, and assignments of CIA operatives. We therefore affirm its judgment that the state secrets doctrine requires dismissal of the case.

I.

Jeffrey Sterling, an African American, was an Operations Officer in the CIA's Near East and South Asia division from 1993 to 2001. He alleges that during this time he experienced unlawful discriminatory practices at the hands of CIA management. For instance, Sterling believes that the expectations for him were "far above those required of non-African-American Operations Officers." He says his superiors repeatedly denied him advantageous opportunities, subjected him to disparate treatment, and gave him Advanced Work Plans that contained more rigorous requirements than those given to non-African Americans.

He also alleges retaliation for utilizing the internal Equal Employment Opportunity ("EEO") process. He claims that he was scheduled to undergo security processing earlier than he should have been. According to him, security processing is an "arbitrary regime within the CIA that is utilized more for its nature as a tool for intimidation than any substantive security implications." He also asserts that management vandalized his personal property.

Sterling initially filed a pro se complaint in the Southern District of New York in August 2001, alleging violations of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.* A complaint (redacted because the CIA objected that the original contained classified information) was served on

the government in January 2002. The district court in the Southern District of New York granted a motion to transfer the case to the Eastern District of Virginia, where the CIA is located. Although the government also asked the judge in New York to dismiss the case based on the state secrets doctrine, he specifically declined to endorse the government's argument.

The CIA renewed its invocation of the state secrets doctrine in the Eastern District. The Director filed both an unclassified and a classified declaration explaining why allowing Sterling to pursue his case would threaten exposure of classified information. The district court conducted an ex parte, in camera examination of both declarations. It satisfied itself that the Director had personally considered the national security implications of both the information that Sterling would need to establish his case as well as the information that would likely become public if the litigation were to continue.

The district court thus granted the motion to dismiss. It noted that for Sterling to pursue his claim, he would have to disclose the nature and location of his employment and the employment of those similarly situated. Yet Sterling's duties and those of his colleagues -- and even the names of most of his supervisors and colleagues -- were classified, rendering comparative proof of discrimination impossible. After a thorough review, the court concluded that the state secrets doctrine operated to preclude this suit because it barred the evidence that would be necessary to state a prima facie claim. State secrets, the court held, were critical to the resolution of core factual questions in the case, and therefore the doctrine justified dismissal.

Sterling timely appealed the district court's order. We review such legal determinations involving state secrets de novo. *See Molerio v. FBI, 242 U.S. App. D.C. 137, 749 F.2d 815, 820 (D.C. Cir. 1984)*; Charles Alan Wright & Kenneth

W. Graham, Jr., *Federal Practice and Procedure* § 5693 (Supp. 2005).

II.

This case turns on the breadth of the state secrets doctrine, both as to when the privilege can be invoked and as to when a properly invoked privilege justifies dismissing a plaintiff's claim altogether.

A.

The Supreme Court set forth the state secrets doctrine in *United States v. Reynolds, 345 U.S. 1, 97 L. Ed. 727, 73 S. Ct. 528 (1953)*. The Court's discussion of *Reynolds* last Term in *Tenet v. Doe, 161 L. Ed. 2d 82, 125 S. Ct. 1230, 1236-37 (2005)*, confirms its continued validity. *See also Fed. R. Evid. 501* (government evidentiary privilege in federal law cases is a matter of federal common law).

Reynolds concerned suits that followed the crash of a military aircraft that had been testing secret electronic equipment. The government "filed a formal 'Claim of Privilege'" in which it argued that the aircraft was on "'a highly secret mission of the Air Force,'" and disclosure of the requested materials would "'seriously hamper national security, flying safety and the development of highly technical and secret military equipment.'" *345 U.S. at 4-5*. The Court held that widows of those killed in the accident could not demand "production of the Air Force's official accident investigation report" and other such documents to assist their suit under the *Federal Tort Claims Act*. *Id. at 3*. The Court sustained the government's refusal to produce the materials by citing "the privilege against revealing military secrets, a privilege which is well established in the law of evidence." *Id. at 6-7* (citing, inter alia, *Totten v. United States, 92 U.S. 105, 107, 23 L. Ed. 605 (1875)*). "State secrets" and military secrets are equally valid bases for invocation of the evidentiary privilege. *Id. at 7*.

Reynolds explained the nature of the privilege and the process for applying it:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Id. at 7-8 (footnotes omitted).

Judicial involvement in policing the privilege is important, but the Court emphasized limitations on a judge's supervisory function. *Reynolds* analogized the judicial inquiry in a state secrets case to the judge's role in regulating the invocation of the privilege against self-incrimination. "Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Id. at 8*.

Recognizing this conflict as a "real difficulty," *id.*, the Court resolved it the same way it had resolved the identical dilemma in the self-incrimination context, *see id. at 8-10*. "The court must be satisfied from all the evidence and circumstances, and 'from the implications of the question . . . that a responsive answer . . . or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" *Id. at 9* (quoting *Hoffman v. United States, 341 U.S. 479, 486-87, 95 L. Ed. 1118, 71 S. Ct. 814 (1951)*). In other words, once the court is "satisfied" that any response at all to a question or request for production might

have a deleterious effect on national security, "the claim of the privilege will be accepted without requiring further disclosure." *Id. at 9.*

B.

What is required to satisfy a district judge will depend on the circumstances of the case. The plaintiff's "showing of necessity" for the privileged evidence "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Reynolds, 345 U.S. at 11.* However, national security concerns are paramount, for "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* (citing *Totten).*

Thus, *Reynolds* made clear that the process of "satisfying" a district judge that the privilege has been properly invoked does not necessarily require in camera review of all the materials likely to contain state secrets:

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.

Id. at 9-10. The Court held that "when this is the case . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id. at 10.*

The Supreme Court reaffirmed this principle in *United States v. Zolin, 491 U.S. 554, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989)*. That case relied heavily upon *Reynolds* in discussing a judge's role in determining whether a particular attorney-client conversation fell outside the attorney-client privilege because the client was seeking advice regarding the perpetration of "a future crime or fraud." *Id. at 563*. Even in that context, far removed from the national security concerns at stake when the state secrets doctrine is invoked, the Court refused to undermine the evidentiary privilege by automatically requiring in camera review of presumptively privileged materials. *Id. at 570-71* (citing *Reynolds)*. Instead, "the party seeking in camera review must make some threshold showing that such review is appropriate." *Id. at 570*.

Zolin was sensitive to "the burdens in camera review places upon the district courts," and refused to allow parties to force "groundless fishing expeditions" upon them. *Id. at 571*. This admonition certainly applies where national security concerns are involved. Once the judge is satisfied that there is a "reasonable danger" of state secrets being exposed, *Reynolds, 345 U.S. at 10*, any further disclosure is the sort of "fishing expedition" the Court has declined to countenance. Courts are not required to play with fire and chance further disclosure -- inadvertent, mistaken, or even intentional -- that would defeat the very purpose for which the privilege exists.

The threat of "graymail" likewise counsels courts to be cautious about risking exposure of sensitive materials. Graymail is a practice where "individual lawsuits [are] brought to induce the CIA [or another government agency] to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations." *Tenet, 125 S. Ct. at 1238*. Unlike a criminal case, where the government can drop the charges if it fears that litigation presents

unacceptable security risks, civil claims put the plaintiff in the driver's seat. *See Reynolds, 345 U.S. at 12.* The state secrets privilege provides a necessary safeguard against litigants presenting the government with a Hobson's choice between settling for inflated sums or jeopardizing national security. Were judges to fail to take care to avoid unnecessary risks of disclosure when the privilege is invoked, the incentives for graymail would correspondingly increase.

In sum, once a formal and proper claim of privilege has been made, district courts frequently can satisfy themselves of the sufficiency of that claim through the explanation of the department head who is lodging it. Such explanations often come in the form of affidavits or declarations made personally by the department head. *See, e.g., Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991)*(assertion by Secretary of State); *In re Under Seal, 945 F.2d 1285, 1287 (4th Cir. 1991)*(affidavit by Secretary of Defense); *Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242, 1243 n.9 (4th Cir. 1985)* (affidavit by Secretary of the Navy); *Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980)* (en banc) (affidavit by Secretary of the Navy).

There may of course be cases where the necessity for evidence is sufficiently strong and the danger to national security sufficiently unclear that in camera review of all materials is required to evaluate the claim of privilege. But both Supreme Court precedent and our own cases provide that when a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not -- indeed, should not -- probe further.

III.

Sterling contends that the state secrets evidentiary privilege does not require dismissal of his claim. He argues that the "district court abdicated its responsibility" when it reached the opposite conclusion. He bases this assertion on his belief that the privilege was improperly invoked and that

the district court should have attempted to devise "adequate protective measures" to allow the case to proceed even if classified materials were a part of it. Applying the foregoing standards, however, we conclude that the state secrets evidentiary privilege was indeed applicable and required the dismissal of Sterling's claim.

A.

Sterling may prevail in his Title VII claim in one of two ways. First, he may present direct evidence of his superiors' discriminatory intent. Second, he may attempt to satisfy the test specified in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*, which allows him to raise an inference of discriminatory intent by showing that he was treated worse than similarly situated employees of other races. *See White v. BFI Waste Servs., LLC, 375 F.3d 288, 295 (4th Cir. 2004)*. Defendants are then entitled to respond by presenting a legitimate, nondiscriminatory reason for their actions. *See, e.g., Gillins v. Berkeley Elec. Coop., 148 F.3d 413, 415 (4th Cir. 1998)*. The burden would finally shift back to Sterling to demonstrate that this reason was a pretext for discrimination. *Id. at 415-16*.

"Regardless of the route a plaintiff follows in proving a Title VII action, . . . the existence of some adverse employment action is required." *James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375 (4th Cir. 2004)* (citation and footnote omitted). Here, Sterling seeks to prove discriminatory adverse employment actions by presenting evidence that higher expectations were placed upon him than upon similarly situated non-African American CIA operatives and that he was passed over for operational opportunities. He further alleges defendants retaliated against him for lodging his EEO complaint by forcing him to undergo a premature security screening and vandalizing his personal property.

B.

Consideration of the state secrets privilege can only proceed if the privilege was properly invoked under the procedures described by *Reynolds*. Here, the district court correctly determined that those procedures were followed. There is no doubt that the Director is "the head of the department which has control over the matter" and has lodged a formal claim of privilege. *Reynolds, 345 U.S. at 7-8.* He has stated that this claim came after his personal consideration of the matter, and in both classified and unclassified declarations, he has explained why the privilege must be applied. *See id.*

The subsequent inquiry is whether the materials necessary for pressing Sterling's Title VII claim or defending against it are likely to result in inappropriate disclosure of state secrets. The district court noted the Director's declaration that litigating the factual issues in this case would compromise CIA sources and methods, threaten the safety of intelligence sources, and adversely affect foreign relations. There is no question that "information that would result in . . . 'disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments'" falls squarely within the definition of state secrets. *Molerio, 749 F.2d at 820-21* (quoting *Ellsberg v. Mitchell, 228 U.S. App. D.C. 225, 709 F.2d 51, 57 (D.C. Cir. 1983)).* We are convinced, as was the district court, that such information forms the very basis of the factual disputes in this case.

As a covert operative, Sterling's position and responsibilities inherently involved state secrets. We hardly need defend the proposition that CIA personnel, activities, and objectives must be protected from prying eyes. The Supreme Court has noted in the context of discussing the *Freedom of Information Act* (FOIA) "that Congress intended to give the Director of Central Intelligence broad power to

protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent." *CIA v. Sims, 471 U.S. 159, 170, 85 L. Ed. 2d 173, 105 S. Ct. 1881 (1985).*

This national security concern is particularly acute here because as a covert operative, the nature of Sterling's duties may well have involved recruiting foreign sources of intelligence. Congress has imbued the Director with "very broad authority to protect all sources of intelligence information from disclosure." *Id. at 168-69* (discussing FOIA). "'The continued availability of intelligence sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger their personal safety.'" *Id. at 175-76* (quoting *Snepp v. United States, 444 U.S. 507, 512, 62 L. Ed. 2d 704, 100 S. Ct. 763 (1980)* (per curiam))(alterations omitted).

There is no way for Sterling to prove employment discrimination without exposing at least some classified details of the covert employment that gives context to his claim. If he were to employ the *McDonnell Douglas* framework to establish his prima facie case, he would be required to show that he was treated worse than similarly situated non-African American agents. This inquiry would expose classified information involving not only Sterling's activities, but those of other agents as well. It would be impossible to avoid investigation into the comparative responsibilities of Sterling and other CIA agents, the nature and goals of their duties, the operational tools provided (or denied) to them, and their comparative opportunities and performance in the field.

Similar comparative evidence is necessary for Sterling to meet his further burden of establishing that he suffered an adverse employment action. * Every such action that he alleges rests upon an assertion that non-African Americans

were treated more favorably than he. Sterling claims that the expectations for his performance were "far above those required of non-African-American Operations Officers," that his Advanced Work Plan "was considerably more demanding and 'harsher' than any requirements placed on non-African-Americans," and that he was "repeatedly passed over for operational opportunities" (which presumably went to less qualified operatives of other races). Proof of these allegations would require inquiry into state secrets such as the operational objectives and long-term missions of different agents, the relative job performance of these agents, details of how such performance is measured, and the organizational structure of CIA intelligence-gathering.

> * Sterling's suggestion that he could avoid *McDonnell Douglas* comparative analysis by presenting direct evidence of discrimination is therefore unavailing. Assuming such evidence sufficient to prove discriminatory intent, some type of comparator would still be necessary to establish that he in fact suffered one of the adverse acts of discrimination that he alleges.

Sterling's retaliation claims similarly depend on proof of facts that are state secrets. He cannot prove his assertion that CIA security processing is an "arbitrary regime . . . that is utilized more for its nature as a tool for intimidation than any substantive security implications" without evidence regarding the CIA's internal security procedures. And his claim of personal property vandalism would require proof of details regarding where and when it might have happened, who his superiors were who might have ordered it, and why they had cause to retaliate against him.

Even assuming Sterling were somehow able to manage the impossible feat of making out all the elements of a Title VII claim without revealing state secrets, further issues would remain. The government would be entitled to present,

as a defense to Sterling's prima facie case, legitimate nondiscriminatory reasons for its actions. This defense would have to show exactly why the CIA gave Sterling different assignments and different operational tools from his peers. The evidence required would inescapably reveal the criteria inherent in sensitive CIA decisionmaking.

Furthermore, the very methods by which evidence would be gathered in this case are themselves problematic. Many of the witnesses would necessarily be covert CIA operatives. Forcing such individuals to participate in a judicial proceeding -- or even to give a deposition -- risks their cover. And once they do appear, it is doubtful what information they could provide that would not have national security implications. Almost any relevant bit of information could be dangerous to someone, even if the agent himself was not aware that giving the answer could jeopardize others. The Supreme Court has cautioned that "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Sims, 471 U.S. at 178* (quotation marks omitted). Only the Director has the expertise to attest -- as he has -- to this larger view. *Cf. id.* (noting that Congress has granted the Director the power under FOIA even "to withhold superficially innocuous information" if it "might enable an observer to discover the identity of an intelligence source").

In short, the Director has met the requirements for application of the state secrets doctrine here and went beyond them, providing a classified declaration, which the district court was able to review in camera. The district court's reliance on that declaration, combined with the highly classified nature of the allegations in Sterling's own complaint, was more than adequate to conclude that the state secrets privilege was properly invoked.

C.

Even if the state secrets privilege is applicable, Sterling contends that dismissal of his entire case was error. Like the district court, however, we believe that dismissal follows inevitably when the sum and substance of the case involves state secrets.

We have long recognized that when "the very subject of [the] litigation is itself a state secret," which provides "no way [that] case could be tried without compromising sensitive military secrets," a district court may properly dismiss the plaintiff's case. *Fitzgerald, 776 F. 2d at 1243*; *see also Farnsworth Cannon, 635 F.2d at 281* (dismissal ordered since establishing a prima facie case was impossible without threatening to disclose privileged information). To be sure, dismissal is appropriate "only when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Fitzgerald, 776 F.2d at 1244*. But where "the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters," dismissal is the proper remedy. *DTM Research, LLC v. AT&T Corp., 245 F.3d 327, 334 (4th Cir. 2001)* (quotation marks omitted).

Needless to say, litigation centering around a covert agent's assignments, evaluations, and colleagues meets this test. "Here, the whole object of the suit and of the discovery is to establish a fact that is a state secret," *Molerio, 749 F.2d at 821* -- namely, the methods and operations of the Central Intelligence Agency. As explained above, Sterling cannot prove his Title VII claim, nor can the government defend against it, without presenting evidence on topics that are state secrets. "If the case cannot be tried without compromising sensitive foreign policy secrets, the case must be dismissed." *Bowles, 950 F.2d at 156.*

Sterling's argument that the court could devise special procedures that would allow his suit to proceed must therefore fail. Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial -- or even in camera -- is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

D.

We recognize that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear. "When the state secrets privilege is validly asserted, the result is unfairness to individual litigants -- through the loss of important evidence or dismissal of a case -- in order to protect a greater public value." *Fitzgerald, 776 F.2d at 1238 n.3.* Yet there can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk. *See Reynolds, 345 U.S. at 11.*

We take comfort in the fact that Sterling and those similarly situated are not deprived of all opportunity to press discrimination claims. The CIA provides, and Sterling has utilized, an internal EEO process where his claims may be heard and resolved. While the state secrets privilege is not contingent on the availability of such internal or administrative process, invocation of the privilege in federal court must not operate to discourage the CIA's own efforts to provide a working environment that honors our nation's bedrock commitment to nondiscrimination and fair treatment.

IV.

The Director has satisfied us, as he did the district court, of the "reasonable danger that the [material sought by

Sterling] would contain references to the secret" anti-terror or other national security concerns that were "the primary concern" of hiring Sterling as a covert operative in the first place. *Reynolds, 345 U.S. at 10.* We are neither authorized nor qualified to inquire further. For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

JEFFREY ALEXANDER STERLING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No.
	)	03-CV-329
GEORGE TENET,	)	
Director, Central Intelligence Agency,	)	
et al.	)	
	)	
Defendants.	)	

[MARCH 3, 2004]

MEMORANDUM ORDER

THIS MATTER is before the Court on two of the parties motions. The first, is the Defendants' Motion to Dismiss, based on Defendant Tenet's invocation of the state secrets privilege. The second, is the Plaintiff's Motion for Preliminary Injunction to Compel Return of EEO File Taken From Counsel. This case concerns Plaintiff's race discrimination claims made under Title VII. The issue before the Court is twofold. First, whether Defendant Tenet properly invoked the state secrets privilege? Second, if the Court recognizes the state secrets privilege, whether Plaintiff can prove his prima facia case of race discrimination?

Defendant Tenet is the Director of Central Intelligence (the DCI). As such, he is the head of the Central Intelligence Agency (the CIA) and the United States Intelligence Community. As DCI, Defendant Tenet has a statutory duty as

the custodian of the files and records of the CIA. He is also charged with protecting and preventing unauthorized disclosure.

Plaintiff, an African-American former employee of the Central Intelligence Agency, alleges that he was passed over on promotions because of this race, subjected to disparate treatment, and the subject of agency retaliation after he began equal employment opportunity proceedings. Defendant Tenet has invoked the state secret privilege, and a formal claim of statutory privilege of the DCI and the CIA to protect intelligence sources and methods, pursuant to 50 U. S. C. §§ 403-3(c)(6), 403g. Defendant Tenet argued that by litigating this case, there is the possibility of disclosure of both "Secret" and "Top Secret" classified information.[1] In support of his assertion of the state secrets privilege, the DCI has also filed both classified and unclassified declarations, dated April 17, 2002, detailing his reasoning behind the use of this privilege.[2]

The Court holds that the Defendant Tenet properly invoked the state secrets privilege. Based upon case law of both the United States Supreme Court and various United States Courts of Appeals, the Court is obligated to honor the DCI' s assertion of this privilege, and remove all privileged information from this litigation. The Court also finds that

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[1] Information classified at "Secret" is material which is reasonably likely to cause serious damage to the national security. Information classified at "Top Secret" is material which is reasonably likely to cause exceptionally grave damage to the national security. *See* Exec. Order No. 12356, 47 Fed. Reg. 14874 (Apr. 2 1982).

[2] The Court has done an *ex parte*, *in camera* review of Defendant Tenet's classified and unclassified declarations, which detail the reasons behind his invocation of the state secrets privilege.

since this privileged information is at the heart of all of Plaintiff's claims, he cannot prove a *prima facie* case, or any of the other elements necessary for his race discrimination, disparate treatment, and retaliation claims. Based on the Court's holding, the Plaintiff's motion, requesting a preliminary injunction to compel return of an EEO file taken from Plaintiff's counsel, is moot, and the Court will not comment on the merits of this motion.

Therefore, the Court finds that the Defendants' have sufficiently pled the state secrets privilege, and as such, Plaintiff lacks a judicial forum to redress his grievances. Therefore, the Defendants' Motion to Dismiss is GRANTED WITHOUT PREJUDICE.

BACKGROUND

Plaintiff Jeffrey Sterling is an African American who formerly served as an Operations Officer in the CIA's Directorate of Operations, Near East and South Asia Division. The Plaintiff served in this position from 1993 through 2001. In his unclassified pleadings, Plaintiff alleges a variety of work place incidents which he claims were racially discriminatory, constituted disparate treatment and were retaliatory against him for initiating internal equal employment opportunity proceedings. Plaintiff brought this Title VII action against Defendants George Tenet, who is the DCI, and John Does #1- 10, who are employees of the CIA. Plaintiff began this case *pro se* in the United States District Court for the Southern District of New York on August 28, 2001. The case was eventually transferred to this Court, and Plaintiff retained the assistance of counsel.

Defendant Tenet invokes the state secrets privilege. Specifically, Defendant Tenet argues that by Plaintiff's role as a CIA Operations Officer, very basic details which are relevant to prove his case, such as the nature of the employment itself, the location of his employment, and the identity of Plaintiff's supervisors and colleagues, all consist

of information which is classified at either the Secret or Top Secret level. In addition, Defendant Tenet argues that the burdens of proof under Title VII necessitate the fact-finder to compare similarly situated covert operations officers work assignments, how they were graded by superiors, and the means as to how they achieved their duties. As DCI, Defendant Tenet argues that he has a statutory duty to protect classified information, and CIA "sources and methods." "Sources and methods" are the particularity in which the CIA gathers intelligence. Defendants argue that the discovery process, as well as the public forum of a trial - either by bench or jury - would compromise sensitive national security information.

Plaintiff argues that this case is nothing more than a Title VII employment discrimination case, which federal trial courts hear everyday. Plaintiff argues that Defendants are using the state secrets privilege as nothing more than a protective shield against its allegedly discriminatory behavior against one of its African American employees. Plaintiff argues that if this Court holds that the states secret privilege is justified, it is eroding the independence between the executive and judicial branches of government. In essence, Plaintiff argues, Defendants' arguments give the executive branch carte blanche do whatever actions it wants - whether legal or not - all in the name of national security. Furthermore, Plaintiff argues that the Defendants are precluded by Rule 12 (g) of the Federal Rules of Civil Procedure from bringing this Motion. Plaintiff argues that Defendants are equitably estopped, and precluded by *res judicata*, from asserting the state secrets privilege to dismiss the entire case based on its failure to timely assert it earlier in the litigation.

STANDARD OF REVIEW

This matter comes before the Court on Defendants' motion to dismiss for failure to state a claim upon which

relief can be granted. *See* Fed. R. Civ. P. 12 (b)(6). Specifically, Defendants' assert the state secrets privilege, and argue that if this Court finds that Defendants properly asserted this privilege, Plaintiff cannot prove his prima facie case of race discrimination. As discussed below, the Court has considered materials outside the pleadings in rendering its decision. In particular, the Court has done an *ex parte*, *in camera* review of Defendant Tenet's classified and unclassified declarations, which detail the reasons behind his invocation of the state secrets privilege. Accordingly, Defendants' motion to dismiss must be treated as a motion for summary judgment. *See* Fed R. Civ. 12(b).

The state secrets privilege is one that is rooted in federal common law to facilitate the Chief Executive's right and duty to protect the military and diplomatic secrets of the nation. *See, e.g., United States v. Reynolds*, 345 U. S. I, 7-11 (1953); *In re Under Seal*, 945 F. 2d 1285 (4th Cir. 1991); *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236 (4th Cir. 1985).

Reynolds was the first case in which the Supreme Court considered, and recognized, the state secrets privilege. Although *Reynolds* dealt specifically with "military secrets," subsequent case law has expanded the state secrets privilege to include information that would result in "impairment of the nation's defense capabilities, disclosure of intelligence gathering methods or capabilities, and disruption of diplomatic relations with foreign governments, " *Ellsberg v. Mitchell*, 709 2d 51, 57 (D.C. Cir. 1983)(footnotes omitted), or where disclosure "would be inimical to national security. " *Zuckerbraun v. General Dynamics Corp.*, 935 F. 2d 544, 546 (2d Cir. 1991).

The *Reynolds* Court held that the state secrets privilege is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the

circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. *Reynolds*, 345 U. S. at 7 - 8. Although *Reynolds* discourages the Court from granting the state secrets privilege[3] lightly, subsequent jurisprudence has held that courts lack the expertise to second guess an executive official's use of the state secrets privilege, and that "courts should accord the utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin v. Helms*, 598 F. 2d 1, 9 (D.C. Cir. 1978).

ANALYSIS

The first step in the Court' s analysis of the state secrets privilege is to determine whether Defendant's Tenet's use of the privilege meets the requirements set forth in *Reynolds*, 345 U.S. at 7-8. After an *in camera* review of Defendant Tenet's declaration, the Court concludes that the state secrets privilege was properly invoked. Defendant Tenet, the Director of Central Intelligence, contends that in order for Plaintiff's case to proceed, Plaintiff would have to reveal intelligence sources and intelligence gathering techniques which would endanger ongoing intelligence operations and operatives in the field. As such Defendant Tenet, as DCI, is the head of the government entity in control of the information relevant to this case, and is charged with the responsibility to direct intelligence operations, to protect national security, and to protect intelligence sources and methods from unwarranted disclosure. *See* 50 U. S. C. § 403-3(c)(6). Defendant Tenet has, as exhibited by both his classified and unclassified declarations, personally considered the information that Plaintiff needs for his case,

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[3] "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Reynolds*, 345 U. S. at 9-10.

and the information that will most likely become public in further litigation proceedings and in trial.

Plaintiff argues that the Court must "not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." Opp'n to Def.'s Mot. to Dismiss and to Proceed *In Camera* and Ex Parte at 16 (quoting *Virtual Defense and Development International v. Republic of Moldova*, 133 F. Supp. 2d 9, 23 (D. C. 2001)).

Applying state secrets jurisprudence to this case puts the Court in an unique bind. If Plaintiff's case did not involve highly sensitive classified material, and if the DCI did not invoke the state secrets privilege, this Court would have no difficulty adjudicating Plaintiff' s Title VII claims. In fact, a great deal of the caseload of this Court involves hearing race, sex, and disability discrimination claims. However, this is not a typical Title VII employment discrimination case. Although Plaintiff argues that this Court can try this case without jeopardizing national security, this argument fails to factor all of the peculiarities of this case. Virtually all of Plaintiff's duties as an Operations Officer are classified. The location of Plaintiff's workplace is classified. All of Plaintiff's supervisors and most of his co-workers names are classified (hence Defendants John Does #1- 10). The basic duties that a Court would ask a jury to perform as fact finder, such as to examine what Plaintiff's duties were, and to compare these duties to similarly situated Operations Officers, are impossible to achieve because all of this information is classified. The only way to achieve this, theoretically, is to choose jurors who have the applicable security clearances. Because the whole point of a jury in the American judicial system is to randomly choose citizens regardless of race, sex, economic status - or other intangibles, such as one's eligibility for a security clearance this is an impossible goal to reach.

Plaintiff's argument that the Court must not become a "rubber stamp" for the executive's use of the state secrets privilege is well taken. To do so would only encourage abuse of the privilege by the executive. Particularly in today s post-September 11th environment, the Court must be mindful of the potential risk or temptation for the executive to encroach on civil liberties and rights behind the curtain of "national security" or "states secrets," unless the Court conducts meaningful judicial review of such claims. However, while the Court is not to second-guess the determination of an agency head who has properly asserted the privilege of state secrets, the Court must assess the substance of the declaration asserting the claim, review the facts of Plaintiff's claims, the evidence which may be necessary to assess the claim, the classification of the evidence, and determine whether there are ways to adjudicate the claim without revealing classified information. *See, e.g., Halkin*, 598 F. 2d at 9.

In a routine Title VII case, under these circumstances plaintiff Sterling could probably prove a prima facie case for race discrimination. However, the fact of the matter is that the DCI has stated that all of the information which plaintiff needs to prove his prima facie case of race discrimination is classified at either Secret or Top Secret. This Court is not an intelligence agency. Therefore it is not the place of the Court to oversee the classification of documents and information, to examine or question the rationale of why officials classified this information at the level it is, or to redetermine whether information is truly "Secret" or "Top Secret. " The only time in which a court should deny the privilege is if, after an examination of the agency head's declaration of his reasoning behind asserting the privilege, it is transparently obvious that the agency is engaging in an abuse of the privilege. Defendant Tenet's assertion of the state secrets privilege to Plaintiff's claims is not such a case.

Once the appropriate executive official properly asserts the state secrets privilege, the court's inquiry becomes

whether the case falls into one or more of the following categories. First, if state secrets are critical to the resolution of core factual questions in the case, the court should dismiss the case. *See D.T.M. Research, L.L.C. v. AT&T Corp.*, 245 F. 3d 327, 334 (4th Cir. 2001); *Fitzgerald v. Penthouse Int'l, Inc.*, 776 F. 2d 1236, 1241-42 (4th Cir. 1985). Second, the court should dismiss the case if the plaintiff's ability to prove his case necessarily depends on or threatens the disclosure of privileged information. *See Farnsworth Cannon v. Grimes*, 635 F. 2d 268, 281 (4th Cir. 1980)(per curiam)(en banc). Third, the court should grant summary judgment to the defendant if the invocation of the privilege deprives him of a valid defense. *E.g., In re United States*, 872 F. 2d 472, 476 (D.C. Cir. 1989).

Plaintiff Sterling's case falls into the first two categories described above. State secrets are critical to the resolution of the core factual questions in the case. *See* Director's Classified Declaration at ¶¶ 1-9, 13-25, 26-34, 36-38 (detailing specifics about intelligence sources and methods employed by the Agency); ¶¶ 13-14, 22-24, 33-34, 36-38, 40-49, 51-52 (explains how specific intelligence sources and methods could be compromised); ¶¶ 23, 31-33, 36 (explains how release of specific information could have direct impact on safety of intelligence sources); ¶¶ 22-25 (explains how disclosure of specific information would have adverse impact on United States foreign relations); and ¶¶6 , 12-21, 34, 38, 40 (explains why it is not possible to sanitize or redact in any meaningful way the classified information necessary to litigate this matter.)

Second, Plaintiff's ability to prove his claim depends on or threatens the disclosure of state secrets. *See id.* Plaintiff was an Operations Officer in the covert operations directorate of the CIA. Basic pieces of information, such as where Plaintiff worked, what his duties were, and a comparison of those duties to other Operations Officers, all are matters classified at either the Secret or Top Secret levels. In essence,

Plaintiff cannot make a prima facie case as to any of his discrimination claims. Although Plaintiff argues that the redacted administrative EEO record contains sufficient unclassified direct and indirect evidence of discrimination for him to make his prima facie case, it is not for the Court, in this case, to second guess the judgment of the DCI in asserting the state secrets privilege. The potential for inadvertent exposure of classified information even relying upon the EEO file, is simply too great.

Finally, the Court holds that Rule 12(g) of the Federal Rules of Civil Procedure, equitable estoppel, and res judicata do not preclude Defendants from asserting the state secrets privilege at this stage of the litigation. Plaintiff argues that Defendants are precluded under all of these doctrines because the Defendants previously filed a motion in the Southern District of New York seeking that this case be dismissed for lack of venue, or, in the alternative, that it be transferred to the Eastern District of Virginia under 28 U. S. C. § 1404(a). Judge Schwartz in the Southern District of New York, denied Defendants' motion to dismiss based on lack of venue. In Judge Schwartz s opinion, he addressed the issue of the state secrets privilege, and found that the invocation by Defendant Tenet of the state secrets privilege was inappropriate in this case. However, Judge Schwartz does admit that, unlike in the matter before this Court, Defendant Tenet only "contends that the decision to invoke the state secrets privilege should be given deference [and] (correctly) stops short of arguing that its mere invocation mandates dismissal. " *Sterling v. Tenet, et al.*, No. 01 Civ. 8073, slip op. at In this case, Defendants argue that proper invocation of the state secrets privilege should not be given deference, but dismissal. In addition, unsealed exhibit 14, a Government Memorandum addressed to Judge Schwartz during the Southern District of New York litigation, specifically states that the Defendants intend to move solely on the issue of venue without prejudice to the Government's right, either in the Southern District of New

York or the Eastern District of Virginia, to raise any other ground for dismissal of the Complaint. Judge Schwartz's opinion was simply *dicta* for this Court.

The very idea that a citizen has a right without a remedy in this context is not a satisfactory result at first blush. As in *Tilden*, this Court is fully aware that the invocation of the state secrets privilege in this case will deny Plaintiff a forum under Article III of the Constitution for adjudication of his claim. Dismissal of a case based upon the state secrets privilege is extraordinary, but not unprecedented. *See e.g., Bowles v. United States*, 950 F.2d 154 (4th Cir. 1991) (dismissal warranted because "no amount of effort or care will safeguard the privileged information.); *Fitzgerald*, 776 F. 2d at 1243 (dismissal of defamation action warranted "because there was simply no way [the] case could be tried without comprising sensitive military secrets"); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984)(dismissal of Title VI I lawsuit warranted because without disclosure of state secrets, insufficient evidence of discrimination existed). While this case meets the requirements of state secrets, there is no general rule that the Civil Rights Act does not apply in cases involving employment discrimination and the Central Intelligence Agency, or any other national security agency. Each case must be measured on its own merits.

After a thorough analysis of the framework set forth in *Reynolds* and its progeny, the Court holds that Defendants invocation of the state secrets privilege stands, and Plaintiff's case must be dismissed to protect classified information without a determination on the merits.

Conclusion

In conclusion, Defendant Tenet has properly invoked the state secrets privilege as outlined in *Reynolds* and its progeny. Because Defendant Tenet has properly invoked this privilege, Plaintiff does not have the ability to present a

prima facie case on any of his discriminatory claims. Finally, Plaintiff's civil procedure arguments, that Defendants invocation of the state secrets privilege is barred by Federal Rule of Civil Procedure 12(g), equitable estoppel, and *res judicata* also fail. Judge Schwartz's opinion was *dicta*, and this Court finds that Defendants properly invoked its state secrets privilege.

For the foregoing reasons, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED WITHOUT PREJUDICE. Plaintiff is DENIED leave to amend his Complaint. The Clerk is directed to enter judgment in favor of Defendants pursuant to Rule 58 of the Federal Rules of Civil Procedure. The Clerk is directed to forward a copy of this Order to counsel.

Entered this 3rd day of March, 2004.

/s Gerald Bruce Lee

United States District Judge

Alexandria, Virginia

03/03/04

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

JEFFREY ALEXANDER STERLING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No.
	)	03-CV-329
GEORGE TENET,	)	
Director, Central Intelligence Agency,	)	
et al.	)	
	)	
Defendants.	)	

ORDER

THIS MATTER is before the Court on Defendant's Motion to Dismiss. In its previous Memorandum Order of March 3, 2004, the Court granted Defendant's Motion to Dismiss, and denied Plaintiff leave to amend his Complaint. From the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendants George Tenet, Director of Central Intelligence, *et. al*, and AGAINST Plaintiff Jeffrey Alexander Sterling.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 3rd day of March, 2004.

/s Gerald Bruce Lee

United States District Judge

Alexandria, Virginia

03/03/04

TO BE FILED UNDER SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY ALEXANDER STERLING
Plaintiff,

01 Civ. 8073 (AGS)
-versus-

MEMORANDUM DECISION

GEORGE TENET, Director, Central Intelligence Agency, JOHN DOE (1-10),
Defendants.

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

I. Introduction

Plaintiff Jeffry Alexander Sterling, an African-American male, was employed by the Central Intelligence Agency ("CIA") as an operations officer. He alleges that during his tenure at the CIA, he was subjected to racial discrimination. He also alleges that he was retaliated against for pursuing a claim through the equal employment opportunity process. Defendant George Tenet moves to dismiss the complaint for improper venue, or in the alternative, to transfer venue to the Eastern District of Virginia. For the reasons set forth below, Tenet's motion to dismiss is denied and his motion to transfer venue is granted.

II. Factual Background[1]

As a preliminary matter, the Court notes that substantively speaking, this action is similar to many employment discrimination cases that have been before this Court. However, Sterling was not only employed by the CIA, but he worked as an operations officer - meaning he worked clandestinely. Thus , the factual details of the case, which would otherwise be unremarkable, [TEXT REDACTED BY CIA] potentially compromise the CIA's operations. The briefs on file in this case have been redacted by the CIA. The court, however, has reviewed the original, unredacted briefs, as well as a classified declaration by Tenet. Thus, although the factual background outlined below is somewhat abbreviated, the Court is cognizant of all relevant facts, including facts set forth in sealed and confidential submissions.

Sterling joined the CIA as an operations officer in May 1993. *See* Complaint, at ¶5. After completing his training, he was certified as an operations officer in December 1994. *See id.*, at ¶5. Following his certification, he served in the Washington, D.C. area, an overseas posting, [TEXT REDACTED BY CIA]. *See id.* at ¶5. Sterling alleges that he was subjected to racially discriminatory treatment while working [TEXT REDACTED BY CIA].[2] *See id.* at ¶5.

Sterling arrived in New York in January 1999. *See id.* at ¶6. The CIA had trained Sterling as a [TEXT REDACTED BY CIA]. *See id.* at ¶6. While in New York, Sterling was to serve as the coordinator for the [TEXT REDACTED BY CIA] activities. *See id.* at ¶6. [TEXT REDACTED BY CIA].

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[1] Because this is a motion to dismiss, the Court must assume the truth of the facts set forth in the Complaint. *See, e.g., LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991).

[2] It is unclear whether other African-Americans worked [TEXT REDACTED BY CIA] in non-operations capacities.

According to Sterling, during the period [TEXT REDACTED BY CIA], CIA management placed expectations on him "far above those required of non-African American [operations officers]. *Id.* at ¶7. Sterling claims that he was repeatedly passed over for operational opportunities and subjected to disparate treatment as the only African-American operations officer [TEXT REDACTED BY CIA]. *See id.* at ¶8. He also alleges that in April 2000, CIA management, motivated by a discriminatory animus, presented him with an unrealistic and unjustified Advanced Work Plan that was considerably more demanding and "harsher" than any requirements placed on non-African-Americans. *See id.* at ¶7.

Sterling further contends that he was retaliated against for utilizing the equal employment opportunity ("EEO") process. *See id.* at ¶9. Specifically, he states that although he was not scheduled to undergo updated security processing until 2001, CIA management scheduled him to undergo security processing in May 2000. *See id.* at ¶9. Sterling avers that security processing is an "arbitrary regime within the CIA that is utilized more for its nature as a tool of intimidation than any substantive security implications. *Id.* at ¶9. Sterling also claims that [TEXT REDACTED BY CIA] management vandalized unspecified personal property. *See id.*, .at ¶9.

According to Sterling, the discrimination he suffered while [TEXT REDACTED BY CIA] was part of a pattern of discrimination he suffered during his career at the CIA. *See id.*, at ¶10. He alleges that he had been denied work opportunities and that CIA management told him that he could not be operationally inconspicuous based on his size, skin color, and use of a language not typically spoken by African-Americans.[3] *See id.*, at ¶10. The CIA taught Sterling the language. *See id.*, at ¶10. Sterling also contends that the

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[3] Sterling does not identify the language in question, but given Sterling's [TEXT REDACTED BY CIA], the Court assumes the language is Farsi.

CIA interfered with his right to an attorney. *See id.*, at ¶11. In particular, Sterling notes that his attorney was not granted a security clearance until four months after the initiation of the EEO process. *See id.*, at ¶11.

In light of the foregoing, Sterling has filed the instant action, seeking declaratory relief, damages, and costs and attorney's fees. Curiously, Sterling does not explicitly state in his Complaint the legal basis for jurisdiction before this Court, stating merely that "The United States District Court for the Southern District of New York has jurisdiction over New York County, [TEXT REDACTED BY CIA]" Complaint, at ¶4. The Court presumes that Sterling is bringing this action pursuant to Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e *et seq.*). Tenet moves to dismiss the complaint for improper venue pursuant to FED. R. Civ. P. 12(b)(3). Alternatively, Tenet moves to transfer venue to the Eastern District of Virginia pursuant to 28 U. S. C. § 1404(a).

III. Legal Analysis

A. Tenet's Motion to Dismiss for Improper Venue

Tenet moves to dismiss the Complaint for improper venue. Tenet states that "in a Title VII case the Court must ordinarily determine the extent of the relationship between the alleged discrimination and the chosen venue." Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue ("Motion Brief"), at 6. In this case, however, Tenet contends that the state secrets privilege and other statutory privileges (in particular, Tenet's authority as Director of Central Intelligence to protect intelligence sources and methods) "prevent the Court from making that determination." *Id.* at 7.

In *Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (2d Cir. 1983), the Second Circuit set forth the contours of the state secrets privilege:

> The privilege may be asserted only by the government itself; neither a private party nor an individual official may seek its aid. Furthermore, in order to invoke it, "[t]here must be a formal claim of privilege lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." Possibly because the state secrets doctrine pertains generally to *national security* concerns, the privilege has been viewed as both expansive and malleable. The various harms, against which protection is sought by invocation of the privilege, include impairment of the nations defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments. When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege. However, because of the broad sweep of the privilege the Supreme Court has made clear that "[i]t is not to be lightly invoked." Thus, the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and whenever possible sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.

(Internal citations omitted). Tenet argues that the assertion of the state secrets privilege can potentially lead to outright dismissal of an action. *See* Motion Brief, at 9.

The issue at hand., however, is not whether the state secrets privilege is expansive – both parties acknowledge that

it is. Instead, the issue is whether it is properly being invoked in the instant case. Indeed, as *Ellsberg* makes clear, the "absolute" protection of the state secrets privilege is contingent upon it being "properly invoked." *Ellsberg*, 709 F.2d at 57. While Tenet contends that the decision to invoke the state secrets privilege should be given deference, he (correctly) stops short of arguing that its mere invocation mandates dismissal. Indeed, the Second Circuit has underlined the importance of judicial review in instances where the executive branch invokes the state secrets privilege:

> [T]he Supreme Court has declared that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.'" Thus, to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.

Ellsberg, 709 F.2d at 58 (internal citation omitted). Thus, before determining whether the instant action should be dismissed on the basis of state secrets, the Court must first determine whether the state secrets privilege has been properly invoked.

The gist of Tenet's argument is that [TEXT REDACTED BY CIA]. In response, Sterling argues that [TEXT REDACTED BY CIA] and that the CIA is therefore precluded from invoking the state secrets privilege. In support of this contention, Sterling cites a number of facts. [TEXT REDACTED BY CIA].

The Court also notes that Tenet's invocation of the state secrets privilege in this case is somewhat unusual. For example, in support of its invocation of the state secrets privilege, Tenet relies upon *Zuckerman v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). In that case, the Second Circuit upheld the invocation of the privilege to

block the revelation of "secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation's warships [...]" *Id.* at 547. In contrast to *Zuckerbraun*, where the government, as intervening defendant, sought to prevent disclosure of certain highly technical information, here Tenet seeks to dismiss a case outright based on [TEXT REDACTED BY CIA].[4] *Zuckerbraun*, on its facts, does not support such a conclusion.[5] Defendants also rely upon *Bareford General Dynamics Corp.* 973 F.2d 1138 (5th Cir. 1992). Like *Zuckerbraun*, *Bareford* implicated specific technical information relating to the "design, manufacture, performance, functional characteristics, and testing of these systems." *Bareford*, 973 F.2d at 1142 (quoting *Zuckerbraun*, 935 F.2d 547). While none of the factors enumerated by Sterling would, independently justify denying Tenet the protection of the state secrets privilege, the Court finds that, considering all of these facts together, and in light of Tenet's classified declaration reviewed *in camera* by the Court, the invocation of the state secrets privilege is inappropriate in this case. Consequently, the Court declines to dismiss Sterling's case. Based on the state secrets privilege.

Similarly, the Court declines to dismiss the case based on other statutory privileges cited by Tenet. Sterling odes not dispute the existence of the statutory authority. *See* Opposition Brief, at 16. Tenet cites no authority in his Motion Brief in which an action was dismissed at the outset based upon a statutory privilege. For substantially the same

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[4] While the case in *Zuckerbraun* was dismissed, this was because the case not proceed unless the material in question was disclosed to plaintiff.

[5] Indeed, as Sterling notes, the typical invocation of the state secrets doctrine normally applies to limit discovery rather than to dismiss the entire action from the outset.

reasons as set forth above the Court declines to dismiss this action based on statutory privileges.

B. Tenet's Motion in the Alternative to Transfer Venue

In the alternative to his motion to dismiss, Tenet moves to transfer to the Eastern District of Virginia (the district in which CIA headquarters is located). Venue in a Title VII case is governed by 42 U. S. C. § 2000e-5(f)(3):

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought [1] in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, [2] in the judicial district in the State in which the employment records relevant to such practice are maintained and administered, or [3] in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, [4] but if the respondent is not found within any such judicial district, such an action may be brought within the judicial district in which the respondent has his principal office.

Transfer of venue is governed by 28 U. S. C. § 1404 which states as follows:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the, division in which pending to any other division in the same district. Transfer of proceedings in rem

brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

[...].

Transfer of venue to the Eastern District of Virginia is potentially available because under 28 U. S. C. § 1404(a), the action could have been brought there originally, given that

CIA headquarters is located there as are the relevant employment records. *See* Motion Brief at 19. Sterling does not contest that the action could permissibly be transferred to the Eastern District of Virginia.

Having determined that venue could be transferred to the Eastern District of Virginia, the Court examines whether transfer is appropriate. The starting place for analysis is the general rule that courts should ordinarily defer to a plaintiff's choice of venue. *See, e.g., Caesar v. Interoute Telcomms, Inc*, No. 00 Civ. 8629, 2001 WL 648946, at *3 (S.D.N.Y. June 12, 2001). However, this deference is not absolute, and in any event is substantially reduced "operative facts upon which the litigation is brought bear little material connection to the chosen forum." *Id.* at *3 (citations omitted). While the Court would be amiss in stating that there [TEXT REDACTED BY CIA] in this case, doubts remains as to whether New York is the appropriate venue for this action. Specifically, Sterling alleges in his Complaint not only alleged discrimination [TEXT REDACTED BY CIA] but discrimination throughout his CIA career. *See* Complaint, ¶10. The vast majority of Sterling's career was spent not in New York but in "Washington, D.C." *See* Sterling Declaration, Exhibit 1. Thus, while the Court will give some deference to Sterling's choice of venue, the analysis does not end there. Instead, the Court will proceed to examine other relevant factors:

> (1) the convenience of witnesses, (2) the convenience of the parties, (3) the location of

> relevant documents and the relative ease of access to sources of proof, (4) the locus of operative facts, (5) the availability of process to compel the attendance of unwilling witnesses, (6) the relative means of the parties, (7) the forum's familiarity with the governing law, (8) the weight accorded the plaintiff's choice of forum, and (9) trial efficiency and the interest of justice based on the totality of the circumstances.

Caesar v. Interoute Telcomms, Inc, No. 00 Civ. 8629, 2001 WL 648946, at *4 (S.D.N.Y. June 12, 2001).

With respect to the convenience of witnesses, Sterling concedes that some witnesses are present in the Eastern District of Virginia, but alleges that most [TEXT REDACTED BY CIA]. However, as Tenet notes, Sterling's claims of the locations of several of these witnesses are speculative. Tenet states that the CIA cannot disclose the whereabouts of its employees who may be witnesses, but underlies that their presence in the Eastern District of Virginia would not be suspect because of the presence of CIA headquarters there. In light of these factors, the convenience of witnesses factor favors transfers of venue. The convenience of the parties factor also favors transfer, as the CIA is based in the Eastern District of Virginia and Sterling lives there.[6] Sterling's counsel's office is in the adjacent district of Washington, D.C.

The third factor, the location of relevant documents and relative ease of access to sources of proof also favors transfer, because the relevant documents are located at the CIA Headquarters in the Eastern District of Virginia. The

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[6] Sterling argues that he only lives there because of the CIA's discriminatory practices. Tenet responds by stating that Sterling lived in the Eastern District of Virginia before he lived in New York. Whatever the reason, however, Sterling does currently live in the Eastern District of Virginia.

fourth factor, the locus of operative facts, [TEXT REDACTED BY CIA] Sterling's claim in his Complaint that he suffered discrimination throughout his CIA career. [TEXT REDACTED BY CIA]. *See* Complaint, ¶10. Thus, the locus of operative facts includes [TEXT REDACTED BY CIA] the Eastern District of Virginia.

Compelling the attendance of witnesses is no more onerous in New York than in Virginia, neutralizing the fifth factor. The sixth factor, the relative means of the parties would appear to militate in favor of Virginia, since both Sterling and his counsel reside in the area. However, since Sterling opted to file suit in New York, the Court will assume that either forum would be convenient. The seventh factor is also neutralized because Sterling's claims arise purely under federal law. A New York based federal court is no more competent that a Virginia-based federal court in analyzing a Title VII claim. *See Caesar v. Interoute Telcomms, Inc*, No. 00 Civ. 8629, 2001 WL 648946, at *5 (S.D.N.Y. June 12, 2001). The eighth factor, plaintiff's choice of forum is entitled to some deference, but, for the reasons set forth above, this deference is limited.

The ninth factor, trial efficiency and the interest of justice based on the totality of the circumstances is a catch-all After fully considering all of the submissions in this case, and in light of the other eight factors, the Court determines that the instant action should be transferred to the Eastern District of Virginia.

C. Sterling's Request to Review the Classified Tenet Declaration

In his Opposition Brief, Sterling argues that he and his counsel should be permitted to review the classified declaration submitted by Tenet. In light of the Court's determination that this action be transferred to the Eastern District of Virginia, the Court reserves decision on this

question in order to permit the judge in the transferee jurisdiction to make this determination.

IV. Conclusion

For the reasons set forth above, Tenet's motion to dismiss the Complaint for improper venue is DENIED; his motion in the alternative to transfer venue to the Eastern District of Virginia is GRANTED. Judgment is reserved on Sterling's request to review the classified Tenet declaration.

SO ORDERED.

/s ALLEN G. SCHWARTZ, U.S.D.J.

Dated: New York, New York
January 23, 2003

EXCERPTS FROM TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e et seq

§ 2000e. Definitions

For the purposes of this title [42 USCS §§ 2000e et seq.]--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS § 501(c)] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for

employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], or (B) fifteen or more thereafter, and such labor organization--
(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;
(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent

employees of employers within the meaning of paragraph (1) or (2); or
(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a

labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 USCS §§ 401 et seq.], and further includes any governmental industry, business, or activity

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 USCS §§ 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization--
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any

individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this title [42 USCS §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor

organization to fail or refuse to refer any individual for employment in any position, if--
(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and
(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases.
(1) (A) An unlawful employment practice based on disparate impact is established under this title only if--
(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and

consistent with business necessity; or
(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".
(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.
(3) Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to

discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores. It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders.
(1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--
(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--
(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person

and that an opportunity was available to present objections to such judgment or order by a future date certain; and
(II) a reasonable opportunity to present objections to such judgment or order; or
(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.
(2) Nothing in this subsection shall be construed to--
(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;
(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;
(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or
(D) authorize or permit the denial to any person of the due process of law required by the Constitution.
(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an

unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception. It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.